

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WESLEY BROWN,

Defendant-Appellant.

UNPUBLISHED

January 3, 2003

No. 227953

Midland Circuit Court

LC No. 99-009315-FC

Before: Neff, P.J., and Hoekstra and O’Connell, JJ.

O’CONNELL, J. (*dissenting*).

I respectfully dissent from the majority’s decision to remand this case to the trial court. Because I believe that defendant’s actions supported the scoring on the sentencing guidelines, I would affirm the decision of the trial court.

I first note that, under issue preservation rules, defendant affirmatively waived objection to the sentencing issue by stating agreement with the sentencing scoring at the hearing. A waiver is the intentional relinquishment of a known right and extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (objection to jury instructions). Thus, a party cannot waive objection and then argue on appeal that, as a result, the trial court erred. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001) (objection to evidence withdrawn and waived); see also *People v Maxson*, 163 Mich App 467, 471-472, n 1; 415 NW2d 247 (1987) (objection to presentence investigation report forfeited).

However, MCR 6.429(C) provides:

A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under subchapter 6.500. [See also *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002) (court rule controls over apparent conflict with statute that allows preservation of sentencing issue on other grounds).]

On appeal, defendant claims “that the challenge was brought as soon as the inaccuracy could reasonably have been discovered.” MCR 6.429(C). In his brief on appeal, defendant states that

his present appellate counsel is his second appellate counsel and that his first appellate counsel neglected to raise the issue or inform subsequent counsel about it before relinquishing the case. Defendant then raises an ineffective assistance of trial counsel argument, which is not a challenge contemplated by the court rule.

It is clear from the facts of this case that if a sentencing error occurred it could have easily been discovered at or before sentencing as stated by the first part of the court rule. *Id.* In fact, the trial court announced the sentencing score and the defense stated they had time to evaluate it. Any other interpretation would put the court rule in conflict with itself and render the first part of it nugatory. Any party can claim that “the challenge was brought as soon as the inaccuracy could reasonably have been discovered,” *id.*, obliterating the preservation rule.

With regard to the ineffectiveness claim, in my view, the prosecution established that defendant engaged in “terrorism” sufficient for the OV 7 score of 50 points under MCL 777.37(1)(a). Defendant forced the head of his own daughter downward when he forced her to engage in fellatio. This action qualifies as terrorism, sadism, or excessive brutality, defined at the time of defendant’s crime¹ as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense” or “conduct that subjects a victim to extreme or prolonged pain or *humiliation* and is inflicted to produce suffering or *for the offender’s gratification.*” *Id.* (emphasis added); see also generally *People v Gibson*, 219 Mich App 530, 534-535; 557 NW2d 141 (1996), and *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995) (young victims’ vulnerability justified OV 7 sentencing score for CSC offenses). Thus, defendant’s sentence was proper and trial counsel was not ineffective for failing to object to it.

Therefore, I would affirm the trial court’s decision on all issues in this case.

/s/ Peter D. O’Connell

¹ On April 22, 2002, after defendant was convicted, MCL 777.37 was amended in 137 PA 2002 to exclude “terrorism” as a factor in OV 7.